AmBank (M) Bhd v KB Leisure (M) Sdn Bhd

HIGH COURT (KUALA LUMPUR) — SUIT NO D-22NCC-1051 OF 2010
NALLINI PATHMANATHAN J
19 MAY 2011

Contract — Mistake — Recovery of money paid by mistake — Cashier's orders — Forged cheques drawn on account of innocent third party — Actual person responsible for cashing unknown — Defendant bona fide participant — Whether defendant received money as constructive trustee — Whether defendant unjustly enriched at expense of plaintiff — Whether defendant liable to return money to plaintiff — Whether plaintiff succeeded in establishing payment by mistake — Contracts Act 1950 s 73

Contract — Unjust enrichment — Cashier's orders — Forged cheques drawn on account of innocent third party — Whether defendant enriched at plaintiff's expense — Whether natural justice and equity required defendant to refund to plaintiff — Whether circumstances justified imposition of constructive trust

The plaintiff's claim against the defendant, a firm of licensed money changer, was for the sum of RM1,074,710.50, representing the proceeds arising from three forged cheques drawn on the account of an innocent third party, KOHOKU. The facts giving rise to this claim are as follows. On three different dates, three cashier's orders ('COs') were purchased at the plaintiff bank's premises by persons unknown. The COs were made payable to the defendant. The value of these COs was for the abovementioned sum. As payment for these COs, the plaintiff bank received three cheques drawn on the account of one of its customers, KOHOKU. Unknown to the plaintiff and KOHOKU, these cheques were forged. It was established in evidence that at the material time, the original cheque leaves were still in the possession of KOHOKU and the cheques presented were really altered cheques belonging to a former customer, 'Maxx Hi Power'. The three COs made out to the defendant were subsequently cashed into the defendant's account with Maybank (not the plaintiff bank). It was not known who was actually responsible for cashing in the COs, or the true identity of the fraudster. Police investigations had established no link between the defendant and the fraudster. The defendant stated that it had no knowledge of any fraud or forgery that may have been perpetrated on the plaintiff. The defendant further stated that at the material time, it was approached by one 'Allen', purportedly acting for a company called Source Code, seeking to buy certain relatively large sums of foreign currency from the defendant. With the defendant's agreement, the relevant sums in Ringgit Malaysia were deposited

into the defendant's account, whereupon the defendant acquired foreign currency from another money changer, Sharazmin Resources, and duly sold on the foreign currency to Source Code. It turned out that the money deposited into the defendant's account came from the COs that had been raised using the forged cheques. The plaintiff sought to recover the said sum of money paid to the defendant under the COs on the following grounds: (a) payment by mistake, (b) moneys had and received, and (c) constructive trust. The issues for the determination of this court, inter alia, were; (i) whether the plaintiff had a valid cause of action against the defendant in 'mistake' under s 73 of the Contract Act 1950 ('CA'); (ii) whether the plaintiff had a sustainable cause of action in moneys had and received; and (iii) whether the defendant was a constructive trustee for the above sum of money.

Held, dismissing the plaintiff's claim with costs:

(1) Nowhere in this entire series of events can it be convincingly said that there was any payment from the plaintiff to the defendant, let alone a payment under mistake. This underscores the key weakness in the plaintiffs arguments concerning s 73 of the CA and moneys had and received, namely that there was simply never any contractual relationship between the plaintiff and the defendant to begin with. The plaintiff's relief was appropriately to be found against the fraudster who altered the cheques in question, thereby inducing the bank to issue the COs, and not against the defendant who was merely the subsequent receiver of the proceeds and who, in agreement, proceeded to repay these proceeds to the fraudster (see paras 41–42).

(2) In return for being credited with the RM1,074,710.50, the defendant had disgorged the sum of RM1,069,711.54 in foreign currency to Allen, Source Code and/or whichever imposter dealing with the defendant with regard to the foreign currency exchange. The remainder of RM4,998.96, which represented the defendant's profit margin from the exchange, was the normal margin that the defendant would have made in any foreign currency exchange involving the same sums. It therefore, cannot be said that the defendant had been 'enriched' at the plaintiff's expense. Further, in the absence of knowledge of fraud on the part of the defendant, natural justice and equity would not require the defendant to refund the plaintiff (see paras 46(a)–(b)).

(3) Parties cannot be restored to their original position by the defendant refunding the plaintiff. Due to the fraud perpetrated by the unknown trickster, the benefit of the fraud committed via the altered cheques had passed to the fraudster. Requiring the defendant to compensate the plaintiff now would be unjust to the defendant, they having altered their position to their detriment by purchasing the foreign currency which

they then disbursed to the fraudster. The purpose of *restitution in integrum* which is the remedy for unjust enrichment could not achieved (see para 46(c)).

(4) It was far from established that the defendant was at any time in breach of the statutes concerned, namely the Moneylenders Act and the Anti-Money Laundering and Anti-Terrorism Financing Act. The most that could be said was that they may not have complied with the 'guidelines' as stated in the online FAQ, but that was a matter for Bank Negara to look into and to act upon, if necessary. Even if the plaintiff had inquired into the truth of the statements contained on the Forms 9 and 49, they would have been in no position to discover the fraud that had been perpetrated, or indeed any facet of the scheme that would have aided the plaintiff in recovering its money. Therefore, the plaintiff's claim in moneys had and received was unproven. It would not be just and equitable to require the defendant to refund the moneys to the plaintiff (see paras 54–56).

[Bahasa Malaysia summary

Tuntutan plaintif terhadap defendan, sebuah firma pengurup wang berlesen, adalah untuk jumlah sebanyak RM1,074,710.50, mewakili hasil daripada tiga keping cek yang dipalsukan yang ditunaikan atas akaun pihak ketiga yang tidak bersalah, KOHOKU. Fakta yang membawa kepada tuntutan adalah seperti berikut. Pada tiga tarikh yang berasingan tiga *cashier's orders* ('CO') dibeli di premis bank plaintif oleh orang-orang yang tidak dikenali. CO tersebut dibuat untuk pembayaran kepada defendan. Nilai CO ini adalah untuk jumlah yang disebutkan di atas. Sebagai bayaran untuk CO ini bank plaintif menerima tiga cek atas akaun salah satu daripada pelanggannya, KOHOKU. Tanpa pengetahuan KOHOKU, cek-cek ini telah dipalsukan. Telah dibuktikan dalam keterangan bahawa pada masa material, cek asal masih dalam milikan KOHOKU dan cek-cek yang dikemukakan adalah sebenarnya cek yang telah diubah, milik pelanggan lama, 'Maxx Hi Power'. Ketiga-tiga CO yang dikeluarkan kepada defendan adalah kemudiannya ditunaikan ke dalam akaun defendan dengan Maybank (bukan bank plaintif). Tidak diketahui siapa sebenarnya bertanggungjawab untuk menunaikan CO, atau identiti sebenar pemalsu tersebut. Siasatan polis membuktikan tidak ada kaitan di antara defendan dan pemalsu tersebut. Defendan menyatakan bahawa ia tidak ada pengetahuan tentang apa-apa fraud atau pemalsuan yang mungkin telah dilakukan oleh plaintif. Defendan selanjutnya menyatakan bahawa pada masa material, ia dikunjungi oleh seorang bernama 'Allen', kononnya bertindak bagi pihak syarikat yang dinamakan Source Code, meminta untuk membeli matawang asing tertentu dalam jumlah yang besar daripada defendan. Dengan persetujuan defendan, jumlah relevan dalam Ringgit Malaysia didepositkan ke dalam akaun defendan di mana defendan memperoleh matawang asing daripada pengurup wang satu lagi, Sharazmin Resources, dan kemudian

menjual matawang asing tersebut kepada Source Code. Didapati bahawa wang yang didepositkan ke dalam akaun defendan datang daripada CO yang telah dibuat menggunakan cek-cek yang telah dipalsukan. Plaintif sekarang memohon untuk mendapatkan semula jumlah wang tersebut yang dibayar kepada defendan di bawah CO tersebut atas alasan-alasan berikut: (a) bayaran secara salah; (b) wang yang dipunyai dan diterima; dan (c) amanah konstruktif. Isu-isu untuk pertimbangan mahkamah ini, antara lain, adalah: (i) sama ada plaintif mempunyai kausa tindakan yang sah terhadap defendan dalam 'mistake' di bawah s 73 Akta Kontrak 1950 ('AK') (ii) sama ada plaintif mempunyai kausa tindakan yang boleh dikekalkan di dalam wang yang dipunyai dan diterima; dan (iii) sama ada defendan adalah pemegang amanah konstruktif bagi jumlah wang di atas.

Diputuskan, menolak tuntutan plaintif dengan kos:

(1) Tidak ada di mana-mana di dalam siri kejadian yang boleh dinyatakan secara meyakinkan bahawa terdapat apa-apa bayaran daripada plaintif kepada defendan, lebih-lebih lagi bayaran secara salah. Ini menekankan kelemahan asas di dalam hujahan plaintif berkaitan s 73 AK dan wang yang dipunyai dan diterima, iaitu tidak pernah wujud apa-apa hubungan kontrak di antara plaintif dan defendan. Relief plaintif adalah sewajarnya terhadap pemalsu yang mengubah cek-cek yang dipersoalkan, dengan itu mendorong bank untuk mengeluarkan CO dan bukan terhadap defendan yang semata-mata penerima hasil yang kemudian dan yang mana, di dalam perjanjian, meneruskan untuk membayar semula hasil tersebut kepada pemalsu tersebut (lihat perenggan 41–42).

(2) Sebagai balasan diberikan kredit sebanyak RM1,074,710.50, defendan telah menyerahkan kembali jumlah sebanyak RM1,069,711.54 dalam matawang asing kepada Allen, Source Code dan/atau mana-mana penyamar yang berurusan dengan defendan berkaitan dengan penukaran matawang asing tersebut. Baki RM4,998.96 yang mewakili keuntungan margin defendan daripada penukaran tersebut, adalah margin biasa yang akan diperoleh defendan dalam apa-apa penukaran matawang asing yang mengaitkan jumlah yang sama. Dengan itu, tidak boleh dikatakan bahawa defendan telah 'enriched' oleh plaintif. Selanjutnya, dalam ketiadaan pengetahuan tentang fraud pada pihak defendan, keadilan semulajadi dan ekuiti tidak memerlukan defendan memulangkan wang kepada plaintif (lihat perenggan 46(a)–(b)).

(3) Pihak-pihak tidak boleh dikembalikan ke kedudukan asal mereka dengan defendan memulangkan wang plaintif. Disebabkan oleh fraud yang dilakukan oleh penipu yang tidak diketahui, faedah fraud yang dilakukan dengan mengubah cek-cek tersebut beralih kepada pemalsu tersebut. Meminta defendan memberi pampasan kepada plaintif sekarang akan menjadi tidak adil kepada defendan, dengan mereka

mengubah kedudukan mereka sehingga menjejaskan kedudukan mereka dengan membeli matawang asing tersebut yang kemudian mereka berikan kepada pemalsu tersebut. Tujuan *restitution in integrum* yang merupakan remedi untuk pengayaan secara tidak adil tidak boleh dicapai (lihat perenggan 46(c)).

(4) Tidak dapat dibuktikan bahawa defendan telah pada bila-bila masa, memungkiri statut-statut yang berkenaan, iaitu Akta Pemberipinjam Wang dan Akta Pencegahan Pengubahan Wang Haram. Yang paling boleh dikatakan adalah bahawa mereka mungkin tidak mematuhi 'guidelines' seperti yang dinyatakan di dalam FAQ atas talian, tetapi ia adalah perkara untuk Bank Negara perhalusi dan bertindak, jika perlu. Walaupun plaintif telah memeriksa kebenaran kenyataan-kenyataan yang terkandung di dalam Borang-Borang 9 dan 49, mereka tidak mungkin berada dalam kedudukan untuk mengetahu fraud yang telah dilakukan, atau sememangnya apa-apa fakta skim yang mungkin telah membantu plaintif dalam mendapatkan semula wangnya. Dengan itu, tuntutan plaintif dalam wang yang dipunyai dan diterima tidak dibuktikan. Ia tidak akan menjadi adil dan berekuiti untuk memerlukan defendan memulangkan wang tersebut kepada plaintif (lihat perenggan 54–56).]

Notes

For cases on mistake in general, see 3(3) *Mallal's Digest* (4th Ed, 2011 Reissue) paras 5271–5310.

For cases on unjust enrichment in general, see 3(3) *Mallal's Digest* (4th Ed, 2011 Reissue) paras 6646–6650.

Cases referred to

Bank Bumiputra (M) Bhd v Hashbudin bin Hashim [1998] 3 MLJ 262; [1998] 2 CLJ Supp 332, HC (refd)

Barclays Bank Ltd v WJ Simms & Cooke (Southern) Ltd & Anor [1980] QB 677 (refd)

Central London Property Trust Ltd v High Trees House Ltd [1947] KB 130 (refd)

Fibrosa Spolka Ackcyjna v Fairbairn Lawson Combe Barbour Ltd [1942] 2 All ER 122, HL (refd)

Kelly v Solari [1835–42] All ER Rep 320 (refd)

Lee Ah Chor v Southern Bank Bhd [1991] 1 MLJ 428, SC (refd)

Lipkin Gorman a firm v Karpnale Ltd & Anor [1992] 4 All ER 512, HL (refd)

Moses v Macferlan (1760) 2 Burr 1005 (refd)

Pilcher v Rawlins (1872) 7 Ch App 259 (refd)

Re Jones Ltd v Waring and Gillow Ltd [1926] AC 670 (refd)

Legislation referred to

Anti-Money Laundering and Anti-Terrorism Financing Act 2001
Civil Law Act 1956
Contracts Act 1950 s 73
Evidence Act 1950 s 114(g)
Moneylenders Act 1951

Andrew Chiew (Loh Chu Bian with him) (Lee Hishamuddin Allen & Gledhill) for the plaintiff.
Yap Yeow Han (Kamilah & Chong) for the defendant.

Nallini Pathmanathan J:

[1] In this case the plaintiff (a bank) claims against the defendant, a firm of licensed money changers, the sum of RM1,074,710.50, interest thereon, costs and declaratory relief. The sum of RM1,074,710.50 represents the proceeds arising from three forged cheques drawn on the account of an innocent third party, KOHOKU.

[2] The facts giving rise to this claim are as follows. On 22 December 2009, 28 December 2009 and 7 January 2010, three cashier's orders (COs) were purchased at the plaintiff bank's premises by persons unknown. The COs were made payable to the defendant. The sum of the value of these COs is RM1,074,710.50.

[3] As payment for these COs, the plaintiff bank received three cheques drawn on the account of one of its customers, KOHOKU. Unbeknownst to the plaintiff and KOHOKU, these cheques were forged. It was established in evidence that at the material time, the original cheque leaves were still in the possession of KOHOKU and the cheques presented were really altered cheques belonging to a former customer, 'Maxx Hi Power'. These three transactions were part of a series of nine COs that were obtained using the same ploy by the unknown fraudster.

[4] The three COs made out to the defendant were subsequently cashed into the defendant's account with Maybank (not the plaintiff bank) on 22 December 2009, 28 December 2009 and 8 January 2010. It is not known who was actually responsible for cashing in the COs, or the true identity of the fraudster. Police investigations have, to date, established no link between the defendant and the fraudster.

[5] The defendant says that it has no knowledge of any fraud or forgery that may have been perpetrated on the plaintiff. Its account is that at the material time, it was approached by one 'Allen', purportedly acting for a company called

Source Code, seeking to buy certain relatively large sums of foreign currency from the defendant. With the defendant's agreement, the relevant sums in Ringgit Malaysia were deposited into the defendant's account, whereupon the defendant acquired foreign currency from another money changer, *Sharazmin Resources*, and duly sold on the foreign currency to Source Code. It turned out that the money deposited into the defendant's account came from the COs that had been raised using the forged cheques.

[6] The plaintiff now seeks to recover the sum of RM1,074,710.50 paid to the defendant under the COs. The plaintiff brings this action as it has on 31 March 2010 fully reimbursed KOHOKU all sums wrongfully drawn from its account, amounting to RM2,872,950.50.

[7] It is not in dispute that the COs in question were genuine. It was the cheques that were used to purchase the COs in question were forged.

THE PLAINTIFF'S CLAIM

[8] The plaintiff founds its claim on two assertions:

(a) Firstly, the plaintiff says that the sum of RM1,074,710.50 was mistakenly credited into the defendant's account and therefore, the plaintiff is entitled to claim the money under s 73 of the Contracts Act 1950 and the principle of moneys had and received. This may conveniently be termed 'payment under mistake'.

(b) Further and/or in the alternative, the plaintiff claims that the defendant received the sum of RM1,074,710.50 as constructive trustee and is therefore liable to return the funds to the plaintiff. This may conveniently be termed 'the constructive trustee argument'.

[9] Section 73 of the Contracts Act 1950 provides:

> 73 Liability of person to whom money is paid, or thing delivered, by mistake or under coercion
>
> A person to whom money has been paid, or anything delivered, by mistake or under coercion, must repay or return it.

[10] In support of this contention, the plaintiff relies on *RE Jones Ltd v Waring and Gillow Ltd* [1926] AC 670, a decision of the House of Lords. In this case, a rogue who was indebted to the WG under a hire purchase agreement convincingly represented to J that he was the agent of a motorcar company that was about to place a new model on the market. He further represented that WG, as would-be distributor of this new car, would like to engage J as sub-agent, and thereby succeeded in obtaining a cheque from J made payable

to WG which he then produced to WG in satisfaction of his own debt. It was not disputed that WG cashed the cheque in good faith and without knowledge of the cunning fraud, but upon the action of J for recovery of the money the House of Lords ruled in favour of J and ordered WG to repay the proceeds.

[11] It was held that if a payer makes a payment under a mistake induced by fraud of a third person, the payer is entitled to recover from the payee under the rule of money had and received.

[12] The House of Lords also referred to the 19th century decision of *Kelly v Solari* [1835–42] All ER Rep 320 where it was held that money paid under mistake can be recovered even if the means of knowing the mistake were available to the payer beforehand.

[13] In *Barclays Bank Ltd v WJ Simms & Cooke (Southern) Ltd & Anor* [1980] QB 677, a bank had overlooked the stop payment instruction of a customer concerning a cheque, and instead proceeded to honour the cheque. In allowing recovery, Goff J (as he then was) explained the law on the recovery of money paid by a banker under a mistake of fact, viz.

> (1) lf a person pays money to another under a mistake of fact which causes him to make the payment, he is prima facie entitled to recover it as money paid under a mistake of fact
>
> (2) His claim may however fail if:
>
> (a) The payer intends that the payee shall have the money at all events … or
>
> (b) The payment is good consideration, in particular if the money is paid to discharge, and does discharge, a debt owed to the payee (or a principal on whose behalf he is authorised to receive the payment) by the payer or by a third party by whom he is authorised to discharge the debt, or
>
> (c) The payee has changed his position in good faith, or is deemed in law to have done so at p 695

[14] In *Bank Bumiputra (M) Bhd v Hashbudin bin Hashim* [1998] 3 MLJ 262; [1998] 2 CLJ Supp 332, Nik Hashim J (as His Lordship then was) reviewed the law on s 73 of the CA as it applies to bankers, and held that:

> The provisions of s 73 of the CA are very clear without any exception that the payee must repay the money which has been paid by mistake. It is settled law that in an action for the recovery of money paid under mistake, the bank's negligence is irrelevant at p 340.

[15] In the alternative, the plaintiff is also prepared to found its claim under money had and received. The plaintiff submits that where: (1) the defendant

has been enriched, (2) the enrichment occurred at the plaintiff's expense, (3) the enrichment was unjust, and (4) there are no valid defences available to the defendant, the plaintiff ought to recover in money had and received. The plaintiff also asserts that a mistake as to a specific fact is accepted as unjust: see eg O'Donovan, *Lender Liability,* Sweet & Maxwell, London 2005, p 397 at pp 403–406.

[16] Similarly, Atkins' Court Forms states that 'money paid under a mistake of fact may be recovered by an action for money had and received'. See heading 'Money: Practice' at p 247. However, it is to be noted that under item 7 (tab 307, p 249), one essential element of such a claim is that, 'there must be privity of contract between the claimant and the defendant'.

[17] Under item 8 (tab 308, p 250), it is a defence to a claim for money had and received that, inter alia, there was no privity of contract between the parties, or that the parties cannot be restored to their original position by ordering the money to be paid to the claimant.

[18] In the further alternative, the plaintiff claims that the defendant was a constructive trustee of the money as a result of the fraudulent scheme perpetrated by the unknown trickster who forged the cheques purportedly belonging to KOHOKU. The plaintiff relies on the equitable rule that in general, when money is stolen, it becomes trust money in the hands of thief and all subsequent recipients except for a bona fide recipient without notice who has given valuable consideration.

THE DEFENDANT'S CASE

[19] As mentioned above, the defendant claims to have received the money in question from a firm called *Source Code Asia Sdn Bhd*, with no knowledge whatsoever as to any fraud or forgery affecting the plaintiff. The defendant says that on 24 December 2009, 30 December 2009 and 12 January 2010, it sold to Source Code foreign currency amounting to RM1,069,711.54 as valid consideration for receiving the money. Further, since the order was so large, the defendant actually had to purchase the foreign currency from a firm known as *Sharazmin Resources*, in order to sell the foreign currency on to Source Code. The remainder of RM4,998.96 in the hands of the defendant is merely what it would have earned in any other transaction involving the same amount of foreign exchange. As the money it received has been fully accounted for, the defendant denies being unjustly enriched at the expense of the plaintiff.

[20] The defendant's argument may be categorised into two broad defences. Firstly, the defence of having given valuable consideration; the defendant says that it received the RM1,074,710.54 in return for the foreign currencies it sold to Source Code.

[21] Secondly, the 'change of position' defence; the defendant had changed its position after receiving the funds, such that it would not be equitable or conscionable to require the defendant to repay the sum to the plaintiff. The defendant also argues that at all material times, it did not have the requisite knowledge, actual or constructive, that would warrant the imposition of a constructive trust over the money. The defendant claims to have acted in good faith and to have no knowledge of any fraud and/or breach of trust involving the plaintiff.

[22] In addition, the defendant questions the plaintiff's claim that the payment into the defendant's account was made by mistake, pointing out that no independent evidence was led to prove that the signatures on the cheques in question were forged, or that these cheques were really altered cheques. The defendant also questions the failure to call the signatory of KOHOKU to the stand, arguing that an adverse inference under s 114(g) of the Evidence Act 1950 ought to be drawn.

[23] Furthermore, the defendant also challenges the claim under constructive trust by arguing that the plaintiff has failed to disclose which of the two known categories of constructive trust this claim is under, ie whether it is a claim of knowing receipt or dishonest assistance. In any event, the defendant says that there has been no evidence that the defendant acted in bad faith, or had performed any wrongdoing or dishonesty that would justify the imposition of a constructive trust.

[24] The defence of 'change of position' is a relatively new defence to a claim of money had and received, as expounded by Lord Goff of Chieveley in the case of *Lipkin Gorman a firm v Karpnale Ltd & Anor* [1992] 4 All ER 512.

THE *LIPKIN GORMAN* DECISION

[25] In *Lipkin Gorman*, a solicitor fraudulently used money in his firm's client account to gamble at a casino. When the fraud was discovered, the firm attempted to recover against the casino. The House of Lords, allowing the claim in part, held that a recipient of stolen money was under an obligation to restore an equivalent sum to the victim if he had not received in good faith and given full consideration for it, and had thus been unjustly enriched at the expense of the true owner. Here, it was held that the casino had not given good consideration as gambling contracts were null and void under the law and the

casino was under no legal obligation to honour the bets. However, equity required taking into consideration that the casino had also paid out winnings to the fraudulent solicitor, so the amount that the firm could recover from the casino was limited to the casino's net winnings against the solicitor over the entire course of betting.

[26] In this case, the House of Lords affirmed that it is a good defence to a claim for restitution to prove that the defendant has changed his position in good faith, such that it would be inequitable to require him to make restitution, considering all the circumstances.

[27] Lord Bridge of Harwich stated that 'it is right for English law to recognise that a claim to restitution, based on unjust enrichment, may be met by the defence that the defendant has changed his position in good faith'.

[28] Lord Templeman added that in a claim for money had and received by a thief, the plaintiff victim must show that money belonging to him was paid by the thief to the defendant and that the defendant was unjustly enriched *and remained* unjustly enriched, (Emphasis added.) An innocent recipient of stolen money may not be enriched at all. But an innocent recipient of stolen money will be enriched if the recipient has not given full consideration.

[29] Lord Goff of Chieveley explained that at common law, property in money, like other fungibles, is lost as such when it is mixed with other money. However, equity will in appropriate circumstances allow the tracing of stolen money by its rightful owner into the hands of subsequent recipients. As such, an action for money had and received is not usually founded on any wrongdoing by the third party, but on the fact that the third party cannot in conscience retain the money, or … for the third party to retain the money would result in his unjust enrichment.

[30] In *Lipkin Gorman*, when the fraudster placed a bet he received no valuable consideration since the contract of gaming was void and merely binding in honour.

[31] It would be unjust to allow restitution where an innocent defendant's position is so changed that he will suffer an injustice if called upon to repay or to repay in full; the injustice of requiring him to repay outweighs the injustice of denying the plaintiff restitution. Lord Goff explained that the development of the defence (change of position) should be done on a case by case basis.

Does the plaintiff have a valid cause of action against the defendant in 'Mistake' under s 73 of the Contract Act 1950?

[32] *Mistake*. The plaintiff claims that it had acted under the mistaken belief

that KOHOKU applied for the COs in question through genuine 'Remittance Applications' and genuine cheques. However, this was a mistake because at the material time, the real cheque leaves were still in KOHOKU's safekeeping and the COs were raised by the trickery of a fraudster who had altered cheques issued by the plaintiff to another customer. The plaintiff led evidence to indicate that the plaintiff's officers had conducted the necessary checks before the COs were issued, and that more than one officer had checked the documents. Still, the mistake occurred. Nonetheless, it is not for the court to penalise the plaintiff or its officers over this, since it is clear law that in cases of payment under mistake, negligence on the part of the payer does not invalidate the right to recover; *Kelly v Solari, Hashbudin Hashim*.

[33] What is of greater concern, however, is whether the payment to the defendant may safely be categorised as a case where 'money has been paid … by mistake' for the purposes of s 73 of the CA, which is essential if the plaintiff is to succeed under this head.

[34] Firstly, both illustrations to s 73 of the CA envisage a pre-existing contractual relationship between the payer and payee, pursuant to which the payer makes the mistaken payment that it now seeks to recover. This contractual nexus is noticeably missing on the facts of this case. KB Leisure was not even a customer of AmBank. It held its account with Malayan Banking Bhd (Maybank), into which the COs were paid. The absence of any contractual connection between the plaintiff and the defendant sounds the first alarm bell as to the applicability of s 73 of the CA in this context.

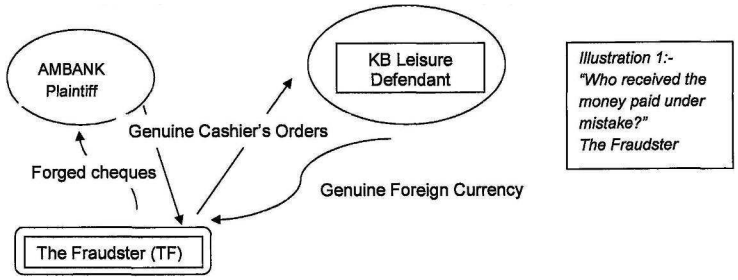
[35] Secondly, there are serious doubts as to whether there was any element of mistake in the plaintiff's payment to the defendant. The transaction between the parties may be analysed as a series of events, as follows. The fraudster presented altered cheques to the plaintiff, and thereby induced the plaintiff to issue genuine COs made payable to KB Leisure. The COs were duly paid into KB Leisure's bank account with Maybank. The plaintiff honoured the genuine COs via the interbank system, and the funds cleared into KB Leisure's account before the plaintiff became aware of the fraud.

[36] If there was indeed mistake on the part of the plaintiff, it would appear that the mistake occurred when it issued the genuine COs in exchange for the altered cheques that had been presented. It is one thing to say that AmBank mistakenly honoured the forged cheques by giving out the genuine COs, and quite another to say that the plaintiff mistakenly honoured the genuine COs by paying out to KB Leisure's bankers.

[37] Furthermore, to assert that the plaintiff made a payment under mistake to KB Leisure is to overlook a key element of the factual matrix, namely the role

played by the unknown fraudster. To do so would also overlook the fact that KB Leisure has neither had nor retained the benefit of any payment made by AmBank, since the true party who has been paid by mistake in this case is the fraudster.

[38] It would appear, therefore, that the course of the payments was as follows:



[39] It will be seen from the illustration above that in acceptance of the altered cheques, the plaintiff honoured the remittance applications submitted by the fraudster and thereupon issued the cashier's orders in question. This was the true 'payment under mistake', for it was at this point that the plaintiff gave the genuine cashier's orders, which have the value of money to whom they are made payable, under the mistaken belief that the cheques were genuine. The fraudster then paid the cashier's orders into the defendant's account, received in exchange the genuine foreign currency provided by the defendant, and disappeared.

[40] Now, let us consider what would have happened when the unknown fraudster paid the cashier's orders into the defendant's accounts with Maybank. In the ordinary scenario of inter-bank transactions, Maybank as the defendant's bankers would present the COs to the plaintiff, and upon the COs being honoured, would credit the defendant's account with the value of the COs.

[41] Nowhere in this entire series of events can it be convincingly said that there was any payment from the plaintiff to the defendant, let alone a payment under mistake. This underscores the key weakness in the plaintiff's arguments concerning s 73 of the CA and moneys had and received, namely that there was simply never any contractual relationship between the plaintiff and the defendant to begin with.

[42] This point is laboured somewhat to illustrate that in the unique

circumstances of this case, the plaintiff's relief is appropriately to be found against the fraudster who altered the cheques in question, thereby inducing the bank to issue the COs, and not against the defendant who was merely the subsequent receiver of the proceeds and who, in agreement, proceeded to repay these proceeds to the fraudster. But if I am *mistaken* in this, my subsequent findings will indicate that this will not affect the conclusions I have reached.

Does the plaintiff have a sustainable cause of action in moneys had and received?

[43] Moneys had and received. The alternative limb on which the plaintiff founds its claim is in moneys had and received. In *Bank Bumiputra (M) Bhd v Hashbudin Hashim,* see five above, Nik Hashim J quoting from *Moses v Macferlan* (1760) 2 Burr 1005 described the cause of action as:

> This kind of equitable action to recover back money which ought not in justice to be kept … lies for money which, ex aequo et bono, the defendant ought to refund; … the gist of this kind of action is that the defendant, upon all the circumstances of the case, is obliged by the ties of natural justice and equity to refund the money. at p 341.

[44] In *Fibrosa Spolka Ackcyjna v Fairbairn Lawson Combe Barbour Ltd* [1942] 2 All ER 122, Lord Wright stated that 'a person should be prevented from retaining the money derived from another which it is against conscience that he should keep'. This case also established that:

> A claim for money had and received lies where the *defendant has received the claimant's money* in such circumstances that he is *obliged by the ties of natural justice and equity to refund it*: he is regarded in law as having received the money to the use of the claimant and the law implies a promise on his part, or imposes an obligation upon him, *on the principle that he has unjustly benefited*, to pay it to the claimant. at p 136 (Emphasis added.)

[45] Therefore, the question to be determined is — has the defendant received the plaintiff's money under such circumstances that natural justice and equity would require a refund? This cause of action is essentially that of unjust enrichment at the expense of the plaintiff.

[46] Having reviewed the totality of the evidence, I would conclude that the defendant has not been unjustly enriched at the expense of the plaintiff and therefore need not make refund to the plaintiff. My reasons are as follows:

(a) In return for being credited with the RM1,074,710.50, the defendant has disgorged the sum of RM1,069,711.54 in foreign currency to Allen, Source Code and/or whichever imposter dealt with the defendant with regard to the foreign currency exchange. Even the remainder of

RM4,998.96, which represents the defendant's profit margin from the exchange, was the normal margin that the defendant would have made in any foreign currency exchange involving the same sums. These points were never challenged in the course of evidence. It therefore cannot be said that the defendant has been 'enriched' at the plaintiff's expense.

(b) The plaintiff has not established in evidence that the defendant had, or could have had, any knowledge whatsoever as to the fraudulent means by which the genuine cashier's orders were raised. In the absence of knowledge on the part of the defendant, natural justice and equity would not require the defendant to refund the plaintiff. See eg *Pilcher v Rawlins* (1872) 7 Ch App 259.

(c) Parties cannot be restored to their original position by the defendant refunding the plaintiff. Due to the fraud perpetrated by the unknown trickster, the benefit of the fraud committed via the altered cheques has passed to the fraudster. Requiring the defendant to compensate the plaintiff now would be unjust to the defendant, they having altered their position to their detriment by purchasing the foreign currency which they then disbursed to the fraudster. The purpose of restitution *in integrum* which is the remedy for unjust enrichment could not be achieved.

[47] For these reasons, I would conclude that the plaintiff has also not made out its claim in moneys had and received, and accordingly this head of claim also fails.

Is the defendant a constructive trustee for the sum of RM1,074,710.50?

[48] *Constructive trustee*. The plaintiff's third possible avenue of success is if a constructive trust could be imposed on the defendant as holder of the moneys. However, to do so would require the defendant to have had some form of knowledge of the fraud that had been perpetrated, or the mistake that had occurred in the course of issuing the COs.

[49] It was submitted for the plaintiff that constructive knowledge of the fact that a mistake had been made would suffice for the imposition of a constructive trust. This would necessarily require an inquiry into whether the defendant could have discovered, had the relevant enquiries been made, the fact that the unknown trickster had procured the COs through the device of the altered cheques.

[50] In this regard, the plaintiff submitted that the defendant had not made the enquiries they ought to have under the Moneylenders Act, the Anti-Money Laundering and Anti-Terrorism Financing Act and the guidelines issued by Bank Negara Malaysia. In evidence, it appeared that the defendant may indeed have omitted to verify the veracity of certain documents provided, such as the Form 9 and Form 49 which were handed over as proof of identity.

[51] The plaintiff has also produced a printout from the Bank Negara website (www.bnm.gov.mv) titled 'Frequently Asked Questions related to Foreign Exchange Administration'. Under the subsection titled 'FAQs related to Money Changing Services', question 4 says:

> 4 Can I pay the licensed money-changer to exchange my desired currencies in other payment instruments other than cash?
>
> No. Customers are only allowed to pay cash at the approved premises of the licensed money-changers. Crediting payment into money-changers' accounts is not allowed.
>
> All licensed money-changers must conduct their transactions with their customers to exchange the currencies in *hard cash only*.

[52] As such, the plaintiff appears to have demonstrated at least non-compliance on the part of the defendant with the BNM 'FAQs'.

[53] However, it is also necessary to consider whether the omissions by the defendant are sufficient to justify the imposition of a constructive trust. Had the relevant enquiries been made, would the defendant have been in a position to discover that the COs had been raised by the ingenious device of the altered cheques?

[54] On the balance of probabilities, I am inclined to conclude that they would not. It is far from established that the defendant was at any time in breach of the statutes concerned, namely the Moneylenders Act and the Anti-Money Laundering and Anti-Terrorism Financing Act. The most that could be said is that they may not have complied with the 'guidelines' as stated in the online FAQ, but that is a matter for Bank Negara to look into and to act upon, if necessary.

[55] I also conclude that, even if the plaintiff had inquired as to the truth of the statements contained on the Forms 9 and 49, they would have been in no position to discover the fraud that had been perpetrated, or indeed any facet of the scheme that would have aided the plaintiff in recovering its money.

[56] Therefore, I am of the view that the plaintiff's claim in moneys had and received is unproven. It would not be just and equitable to require the defendant to refund the moneys to the plaintiff.

THE DEFENDANT'S CASE

[57] From the foregoing, it is clear that the plaintiff has not succeeded in substantiating a claim under any of the three heads it has postulated, namely payment by mistake, moneys had and received, and constructive trust.

[58] Nevertheless, I would add en passant that if I am wrong in the foregoing, the plaintiff's claim would still have to be dismissed as the defendant has demonstrated a good defence of change of position, as elucidated in the case of *Lipkin Gorman* above.

(a) KB Leisure has in good faith materially changed its position by acquiring for value, and disbursing the foreign currency in exchange for the payment credited into its account. Therefore, KB Leisure has altered its position and it would be substantially to its detriment if it were now to be required to refund AmBank the moneys credited.

(b) The change of position is neither tainted nor invalidated by any act of illegality as the plaintiff has failed to prove material non-compliance with the statutory requirements of the Moneylenders Act, Anti-Money Laundering Act and other anti-terrorism legislation.

(c) The plaintiff has not succeeded in imputing to KB Leisure actual or constructive knowledge of any illegality behind the foreign exchange transaction. Therefore KB Leisure is a bona fide participant who has given good value in exchange for what it received, and it is protected by the doctrines of equity.

[59] Indeed, even had the plaintiff succeeded in establishing payment by mistake under s 73 of the CA, I would be inclined to hold that KB Leisure would not be required to refund the payments due to the change of position defence. Long before the Civil Law Act 1956 limited the application of English law in this jurisdiction, it was established law in England that equity prevails over the common law in order to mitigate the harshness of the common law rules; see eg the discussion in *Central London Property Trust Ltd v High Trees House Ltd* [1947] KB 130 s 73 of the CA must be read together with the equitable doctrine that a bona fide purchaser for value takes free of previous proprietary claims over the property in question, in this case the money

credited via the COs. That is the situation in which KB Leisure came into possession of the money in exchange for the foreign currency it had given up, and the equitable defence of bona fide change of position operates to defeat any prior claim to the money, even one founded on s 73.

CONCLUSION

[60] For these reasons, the plaintiff has not made out a case entitling it to claim the RM1,074,710.50 as money paid by mistake and/or as moneys had and received. The plaintiff has also not established the requisite knowledge and/or complicity on the part of the defendant that would warrant a finding that the defendant held the sum of RM1,074,710.50 as constructive trustee for the plaintiff.

[61] In the course of submissions, learned counsel for the plaintiff, Mr Andrew Chiew, indicated that, should the court rule against the plaintiff on the substantive claims, the court could contemplate directing an inquiry into the amount of proceeds arising from the COs in the defendant's hands that was not used to purchase foreign currency in order to sell to Source Code. Mr Andrew also questioned the veracity of the receipts issued by the defendant to Sharazmin, as exhibited in the parties' common bundle of authorities, that indicate a sum of RM4,998.96 as being left over after the defendant purchased foreign currency from Sharazmin to sell on to Source Code.

[62] However, in light of the finding that the payments to the defendants do not constitute payment by mistake under s 73 of the CA, and as the defendant does not hold as constructive trustee for the plaintiff, it is difficult to see under what circumstance the plaintiff could justifiably recover any money from the defendant, let alone request the court to direct an inquiry on these terms.

[63] Moreover, such a claim was not disclosed on the plaintiff's pleadings and was only raised at the stage of submissions. Indeed, the plaintiff had not taken objection to the defendant's receipts as evidence of the defendant's transactions with Sharazmin. It is trite that parties are bound by their pleadings and in civil proceedings, no party is to take the other by surprise; *Lee Ah Chor v Southern Bank Bhd* [1991] 1 MLJ 428. In light of this, the court cannot accede to the plaintiff's request.

[64] The outcome of the findings above is that the plaintiff's claim is dismissed with costs.

Plaintiff's claim dismissed with costs.

Reported by Ashgar Ali Ali Mohamed